Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Verizon Petition for Emergency	)	
Declaratory and Other Relief	)	WC Docket No. 02-202
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REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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SBC Communications Inc. (SBC) hereby files reply comments in response to the oppositions to Verizon's Petition for Emergency Declaratory and Other Relief (Verizon Petition) filed in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

Opponents of Verizon's Petition paint a picture of the telecommunications industry that SBC does not recognize, and does not comport with reality. They shamelessly mischaracterize the nature of incumbent local exchange carrier (ILEC) efforts to protect themselves from the serious problem of bad debt. According to these parties, ILECs have been spared the downturn in the industry and are prospering, more than ever, with gaudy rates of return and virtually no bad debt. They argue that ILECs requests for further protection against bad debt are merely a cynical ploy to siphon massive amounts of cash from carriers who, despite their struggles, pose no credit risk at all.

These arguments are absurd. ILECs have lost 40% of their market value in the past year alone. Moreover, for the first time since the Great Depression, their access lines and revenues are declining. In fact, during the second quarter of this year alone, SBC's access lines declined by 3.8%. Worse yet, these lines losses increasingly are attributable to the UNE-P, which means that, even as SBC loses 60% or so of the revenue associated with those lines, it retains virtually all of the costs of providing them.

Nor is there a light at the end of the tunnel. Having failed to create a retail rate structure that permits real competition for *all* customers, states increasingly are lowering UNE rates in order to conjure up, instead, fake or synthetic competition. Thus, as AT&T marches from state to state threatening to boycott local markets in which it cannot earn a gross margin of at least 45% on local service using the UNE-P,[1] states are obliging with ever-lower UNE rates. As Chairman Powell has noted, rather than rebalance rates to encourage genuine competition, states have made wholesale rates "confiscator[ily] cheap."[2] It was in part because of this "unfavorable regulatory pricing environment" that Moody's Investor Services recently placed SBC's long-term debt on review for a possible downgrade. UNE pricing trends also have been cited repeatedly by analysts who are pessimistic regarding the prospects for an end to the industry recession.

Contrary to the suggestions of competitive local exchange carriers (CLECs) and interexchange carriers (IXCs), the recent spate of bankruptcies has only compounded these problems. SBC's rate of uncollectibles has skyrocketed and it stands to lose hundreds of millions of dollars in uncollectibles from wholesale customer bankruptcies that have occurred in just the past two years. The fact that these losses come at a time when SBC's revenues and access lines are shrinking and bottom line numbers can be approached only through dramatic

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[1] *See* AT&T 2002 Second Quarter Earnings Conference Call, July 23, 2002, 8:15 AM, statement by Betsy Bernard, AT&T Consumer Services President and Chief Executive Officer ("We are not going into states where we don't have a gross margin of 45% on the local. That's kind of our threshold trigger to go in and we are not going to go in on the hope and the prayer that next year or two years from now, the rates may change to make it favorable to the strategy that we are executing for maximizing cash.").

[2] Fred Dawson & Kim Sunderland, *Interview: FCC Chairman Michael Powell,* Phone+ (Apr. 2002), *at* http://www.phoneplusmag.com/articles/24INTERVIEW.html, (Powell Interview).

cost cutting, makes them all the more difficult to absorb. Those who claim otherwise are disingenuous, naïve, or both.

As seen in this context, Verizon's petition and the recent tariff filings of SBC and others are hardly the cynical ploys they are made out to be. They are necessary measures to mitigate spiraling losses that existing tariffs have failed to prevent. Far from being vague, overbroad, or anticompetitive, SBC's tariff, at least, is specific, objective, narrowly tailored, and fully consistent with the requirements of sections 201 and 202.

Indeed, SBC's tariff is far more specific, objective, and narrowly tailored then the tariffs of many of those who purport to find fault with it. AT&T's tariff, for example, permits it to seek deposits from customers with "an unsatisfactory credit rating;"[3] Sage Telecom's tariff permits it to obtain a two-month deposit from customers "who fail to establish creditworthiness or who present an undue risk of nonpayment;"[4] and Level 3's tariff allows it to obtain a deposit from existing customers "when high risk is indicated and existing security is insufficient."[5] SBC is only requesting similar protection, and has done so in an objective and narrowly tailored manner.

As for the other issues raised by Verizon, the Commission has an obligation to support carriers' efforts in bankruptcy courts to obtain adequate assurance from bankrupt companies because Commission rules prohibit carriers from immediately exercising discontinuance rights often granted by bankruptcy courts. Likewise, given that some commenters rely upon the Communications Act as authority for not curing outstanding debts owed on a bankrupt carrier's

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[3] AT&T Tariff FCC No. 30, §3.5.5(A).

[4] Sage Telecom, Inc. F.C.C. Tariff No.1, §. 5.6.

[5] Level 3 LLC, FCC Tariff No. 4, §4.4.3.

executory arrangements, the Commission has an obligation to clarify that the Communications Act does not abrogate the rights of ILEC-creditors to such a cure.

II. THE COMMISSION SHOULD PERMIT CARRIERS TO REVISE THEIR TARIFFS EXPEDITIOUSLY TO PROVIDE ADEQUATE ASSURANCE OF PAYMENT.

CLECs and IXCs opposing Verizon's Petition argue that Verizon and other ILEC revised tariffs are: (1) unnecessary and overbroad, and (2) anticompetitive and unlawful.[6] SBC does not purport to address any tariff other than its own in this Reply. Its own tariff, however, is none of these things.

A. SBC's Proposed Tariff Changes are Necessary and Narrowly Tailored to Mitigate the Growing Risk of Uncollectible Debt.

CLECs and IXCs claim, first, that ILEC requests for deposits from carriers with impaired credit are unnecessary.[7] In support of this assertion, they offer four arguments.[8] One such argument, offered by Mpower, Covad and WorldCom, is that there is no correlation between a firm's credit rating and ability to pay its bills.[9] Industry experts certainly have a different view. Standard & Poor, Moody's and a host of other financial experts have repeatedly opined that

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[6] Time Warner also argues that the ILEC tariff revisions modify the terms of existing term plans without a demonstration of substantial cause. SBC will not belabor the issue here, given that it has filed a detailed response to this argument in its Reply to Petitions to Reject, or in the Alternative, Suspend and Investigate, Transmittal Nos. 1312, 2906, 77, 20, 772, at 21-25 (filed Aug. 16, 2002) (Reply to Petitions to Reject). Therein, SBC demonstrated that none of its term plans reference or alternatively freeze any general provisions. Accordingly, term plan customers have no legitimate expectation with respect to them. In any event, to the extent substantial cause is required, SBC made the requisite showing.

[7] Nextel Opposition at 3; Sprint Opposition at 5; and Time Warner Opposition at 12.

[8] SBC has previously responded to these same arguments, sometimes in more detail, in its Response to Petitions to Reject or Suspend its Tariff Filing. SBC attaches a copy of that response to this Reply and respectfully refers the Commission to it.

[9] Covad Opposition at 5; Mpower Opposition at 3; and WorldCom Opposition at 6.

companies with poor credit ratings are more likely to default on payments.[10] In any event, no one is suggesting that all firms with impaired creditworthiness will default. But the fact is all such companies pose a higher risk of default and ILECs — which are not free to refuse service to them or even cancel service except after significant notice — should not be forced to bear that risk without some level of protection.

Another such argument, offered by several CLECs and IXCs,[11] is that ILECs' returns on special access services and low levels of bad debt belie ILEC assertions that the industry downturn has affected their financial health.[12] As previously discussed, this argument is baseless. ILECs have lost 40% of their market value in the past year. That does not happen in a vacuum. ILECs are experiencing losses in access lines and declining revenues for the first time in modern history – declines that are necessitating layoffs and reductions in capital expenditures that resonate through the entire industry and economy. These problems have been compounded by a spate of bankruptcies and soaring uncollectibles. In fact, SBC's rate of uncollectibles for interstate services has increased dramatically — it rose 55% from 2000 to 2001, and it doubled again during the first six months of 2002. As a result, SBC faces close to half a billion dollars in

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[10] *See, e.g.,* http://www.standardandpoors.com/ResourceCenter/RatingsCriteria/CorporateFinance/articles/10250outlookdefault.html (stating, "speculative-grade issuers with negative outlooks are, on average, nearly five times more likely to default than those with positive outlooks."); "Default and Recovery Rates of Corporate Bond Issuers," Moody's Investor Service, Global Credit Research (Feb 2002).

[11] ALTS Opposition at 5; AT&T Opposition at 6-7; Nextel Opposition at 6; and Sprint Opposition at 5.

[12] CompTel also argues that if ILECs wanted to protect themselves from the risk of nonpayment, they should have remained under rate-of-return regulation and not moved to price caps. This argument is meritless and should be rejected outright. Price cap regulation encourages efficiency and pricing flexibility. It in no way restricts the ability of ILECs to mitigate risks, or for that matter, to take the steps taken by numerous carriers in the industry to protect themselves.

uncollectibles from carriers who filed for bankruptcy in just the past two years. Thus, those who claim that ILEC uncollectibles should be no concern of the Commission are dead wrong.

Of course, arguments about how well or how poorly the ILECs are doing or which carriers have been hurt more are really beside the point. The issue is whether ILECs should have a right to protect themselves from unpaid debt from non-creditworthy carriers that they are legally obligated to serve. SBC can think of no credible argument as to why they do not have such a right.

Several commenters also argue that the ILECs' existing tariffs offer sufficient protection from uncollectibles.[13] That is simply incorrect – a lesson SBC unfortunately has learned the hard way. As detailed in SBC's Reply to Petitions to Reject, SBC's existing tariffs offered little or insufficient protection when WorldCom, Global Crossing and Winstar filed for bankruptcy because none of these carriers had a proven history of late payments or lacked established credit, which are the only two criteria in SBC's existing tariffs that trigger a security deposit. As a result, SBC was left holding the bag for hundreds of millions of dollars of unpaid debt. Recent events have shown that SBC and other ILECs must be in a position to protect themselves, not only when customers cease paying their bills on time, but also when they have sufficiently poor credit that they pose a serious risk of future default.

It is not just incumbents that seek to protect themselves. Many of the same carriers that claim that existing ILEC tariffs are adequate themselves maintain tariffs with much more "subjective" impaired credit deposit provisions. AT&T's tariff, for example, permits it to seek deposits from customers with "an unsatisfactory credit rating."[14] Level 3's tariff allows it to

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[13] Global Crossing Opposition at 6; Nextel Opposition at 4; and Time Warner Opposition at 12.

[14] AT&T Tariff FCC No 30, §3.5.5(A).

obtain a deposit from existing customers "when high risk is indicated and existing security is insufficient."[15] Indisputably, these impaired credit deposit triggers are far more subjective than SBC's proposed triggers.

AT&T, unable to completely sidestep this inconsistency or hypocrisy, acknowledges in passing that it "has from time-to-time insisted on provisions in its contracts with customers that require security deposits and other provisions that protect customers against default."[16] It claims, however, that the critical difference is that it is not dominant and that the customers, therefore, have a choice.

That is no difference at all. As a threshold matter, AT&T misleads the Commission by implying that it has merely from "time-to-time" required security deposits provisions in a few contracts. As just shown, AT&T's federal tariff contains such provisions. In fact, AT&T's tariff provides for a *three-month* deposit and gives AT&T far more discretion than SBC's proposed tariff. In any event, AT&T wholly distorts the significance of its nondominant status. The Commission has never held that unjust and unreasonable terms in the tariffs of nondominant carriers are somehow rendered lawful because customers can purchase their services from others. Rather, the Commission has held that nondominant carriers presumably lack the ability to include unjust and unreasonable terms in their tariffs. The fact that AT&T, as a nondominant carrier, maintains deposit requirements for non-creditworthy customers in its tariffs thus underscores the reasonableness of those provisions, irrespective of whose tariff they are in. AT&T cannot have it both ways. It cannot claim, as it does, that its own tariff provisions are reasonable and that less onerous provisions offered by ILECs are not.

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15 Level 3 LLC, FCC Tariff No. 4, §4.4.3.

16 AT&T Opposition at 13.

In addition to arguing that ILEC tariff revisions are unnecessary, some commenters argue that ILEC tariff provisions are so broad that the provisions would apply to virtually all IXCs.[17] AT&T claims, for example, that because its own debt was recently downgraded, it would be subject to the credit impairment requirements. These commenters are wrong that virtually all carriers would be forced to pay security deposits. AT&T, for example, has an investment grade credit rating of Baa2 from Moody's which is above the highest "junk" bond credit rating. Thus, contrary to AT&T's claims, it would not be subject to SBC's deposit triggers for impaired creditworthiness. Moreover, only customers that meet the $1 million threshold could be captured by SBC's credit triggers, which further tailors SBC's triggers and minimizes any burdens on carriers that do not pose a significant financial risk to SBC.

B. Security Deposits are Neither Anticompetitive nor Unlawful.

CLECs and IXCs not only claim that ILECs do not need additional protection; they also claim that the protection sought is anticompetitive and at odds with sections 201 and 202 of the Act. These arguments are based on a misreading or a misrepresentation of SBC's tariff.

CLECs claim, first, that ILECs seek "unlimited" discretion to impose security deposit requirements.[18] Further, they argue that ILECs could and would abuse that discretion to favor their own affiliates in violation of section 202. These parties mischaracterize SBC's tariff. As SBC explained in its Description and Justification of its tariff revisions and Reply to Petitions to Reject, SBC has fashioned its tariff provisions to minimize its discretion. Unlike many commenters here who have impaired credit provisions giving them sole discretion to determine

[17] AT&T Opposition at 14-16; and Time Warner Opposition at 5.

[18] AT&T Opposition at 14; Time Warner Opposition at 9; WorldCom Opposition at 4.

when a customer has poor credit,[19] SBC defines impaired creditworthiness in a clear and objective manner, relying wholly on industry recognized third party sources. SBC's tariff provisions are thus fully consistent with sections 201 and 202 of the Act.

Second, CLECs claim that ILECs could use their new authority anti-competitively to force CLECs to pay disputed amounts, or risk deposit requirements or even disconnection.[20] This claim is just another deliberate obfuscation of the facts. SBC's tariff in no way treats disputed amounts late unless and until the dispute has been addressed and rejected through well-established longstanding procedures. SBC's tariffs are clear on this point and the Commission must not be confused by these carriers' mischaracterizations.

III. THE COMMISSION SHOULD SUPPORT ILEC EFFORTS IN BANKRUPTCY COURTS TO OBTAIN ADEQUATE ASSURANCE OF PAYMENT.

AT&T, Time Warner, WorldCom and a host of other commenters argue that the Commission should not support ILEC efforts to obtain adequate assurance from bankrupt carriers.[21] These commenters argue that the Commission should leave it to the bankruptcy courts to determine what assurance of payment is adequate. However, given that bankruptcy courts routinely find adequate assurance by relying on ILECs' ability to terminate service immediately for nonpayment — a right ILECs do not necessarily have under the Commission's rules — the Commission *should* support ILECs in their efforts to secure adequate assurance of payment.

Numerous bankruptcy courts have held that an unpaid supplier's ability to immediately terminate service for nonpayment constitutes adequate assurance of payment. Under most

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[19] *See* Section II.A, *supra* at 6.

[20] AT&T Opposition at 15; Mpower Opposition at 6.

[21] AT&T Opposition at 22; CTC Opposition at 7; 14; Global Crossing Opposition at 8; and Time Warner Opposition at 13.

circumstances, this type of payment assurance could prove adequate. But for SBC, and similarly situated ILECs, this most certainly is not the case because the Commission requires carriers to provide end users 30-days notice prior to disconnection. As a result, wholesale providers, such as SBC, may be unable immediately to avail themselves of the payment assurances provided by the bankruptcy court.

This dilemma can be resolved in one of two ways, both of which require Commission involvement. First, the bankruptcy court could require bankrupt carriers to pay ILECs for services in advance or provide deposits as adequate assurance. Second, the Commission could clarify that its 30-day notice requirement for disconnection of service does not apply to wholesale carriers, such as SBC, thereby permitting ILECs to immediately terminate service to bankrupt carriers that fail to make timely payments. Given recent pronouncements by the Commission that it will act to ensure that consumers have adequate notice prior to disconnection,[22] the first option appears the easier of the two. Bankruptcy courts over the years have permitted advance payments — such as in the Northpoint bankruptcy proceeding — or deposits and certainly would be open to feedback from the Commission, particularly concerning issues that could undermine any rights granted by the bankruptcy court.

The bottom-line is the Commission cannot turn a blind eye to the impact of its rules on the ability of carriers to obtain adequate assurance of payment. The Commission must act to harmonize its requirements with the rulings of the bankruptcy courts. The most reasonable approach is to support ILEC efforts in bankruptcy to secure advance payments or deposits for adequate assurance of payment, thereby obviating any need to cut off service to any carrier.

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[22] Letter of Chairman Michael Powell to the Honorable Edward J. Markey (July 10, 2002).

IV. ANY CARRIER THAT SEEKS TO RETAIN THE BENEFITS OF A BANKRUPT CARRIER'S EXISTING SERVICE ARRANGEMENTS IS LIABLE FOR A CURE.

Again, commenters argue that the Commission should leave it to the bankruptcy courts to decide whether existing service arrangements constitute executory contracts necessitating a cure.[23] Further, they argue that the Commission must ensure that dominant carriers, given their market power, do not act anti-competitively to obtain greater cure payments than non-dominant carriers. SBC addresses these arguments below.

Verizon's Petition asks the Commission to confirm that the Communications Act in no way abrogates the rights of ILEC creditors to a cure under Section 365 of the Bankruptcy Code for amounts due from any carrier that seeks to assume or otherwise take the benefits of a bankrupt carrier's executory service arrangements. Several carriers vehemently oppose this clarification, arguing that the Commission has no role in making such determinations. But these same commenters claim that the Communications Act entitles them to receive the benefits of a bankrupt carrier's service agreements without curing the debt on them. Thus, the Commission, as the authority on the Communications Act, has an obligation to resolve this dispute and issue the declaratory ruling requested by Verizon.

Section 365 applies to *all* executory agreements, including telecommunications service arrangements, and carriers assuming them or retaining the benefits of them are obligated to cure the debt on them. To find otherwise would make a mockery of a century of bankruptcy laws and jurisprudence so holding.[24] Absent clear expression of congressional intent to modify the rights

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[23] AT&T Opposition at 24; CTC Opposition at 12; Time Warner Opposition at 15; WorldCom Opposition at 10.

[24] *See In re: Rhythms Netconnections, Inc.*, *et al.* Case Nos.01-14283 through 01-14287(BRL) (Bankr.S.D. New York); *In re: SureTel, Inc.*, Case No.01-21372 WV (Bankr. W.D. Ok.); and *In re: Pointecom*, Case No. 01-01561 (JJF) (Bankr. D. Del.).

of ILEC-creditors, the Commission must construe the Communications Act in harmony with bankruptcy law, and, as part of its public interest mandate, protect innocent ILEC-creditors.[25]

Indeed, the Commission previously has done so. In the NextWave bankruptcy proceeding, the Commission argued that the non-dischargeability of license conditions was confirmed by the Bankruptcy Code's treatment of executory contracts. The Commission maintained that, "[u]nder 11 U.S.C. sec. 365(b), a debtor may 'assume' and thereby retain the benefits of [an executory] contract only if it cures all defaults and provides 'adequate assurance of future performance'; otherwise, the contract must be 'rejected.'"[26] Further, the Commission argued that, "[i]t is well established that a debtor cannot simultaneously seek 'discharge' of its obligations to make payments under such an agreement while retaining the benefits thereof; instead, the debtor must either assume contractual duties along with the contractual benefits, or reject the contract in whole."[27] Thus, the Commission has expressly acknowledged that the Communications Act is consistent with bankruptcy law, and carriers taking the benefits of a bankrupt carrier's executory contracts cannot do so without curing the outstanding debt.

Commenters here, in effect, ask the bankruptcy courts and Commission to ignore jurisprudence and elevate form over substance. These commenters would have the Commission

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[25] *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("When two statutes are capable of coexistence, it is the duty of the courts, absent clearly expressed congressional intention to the contrary, to regard each as effective."); *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974) (requiring the Commission to harmonize its policies under the Act with the Bankruptcy Code, and concluding that the Commission's public interest mandate under the Act includes protecting innocent creditors); *Application of Parsons*, 10 F.C.C. Rcd 2718, 2720 (1995) (deferring to the bankruptcy court on post-petition transfer of a station and its assets "so that innocent creditors may receive the full protection afforded by federal bankruptcy law."), aff'd, 93 F.3d 986 (D.C. Cir. 1996) (per curiam).

[26] *Federal Communications Commission v. NextWave Personal Communications, Inc.*, Nos.01-653, 01-657, Brief for the Federal Communications Commission at 33 (filed May 2002) (*NextWave Brief*).

[27] *Id. See also, Federal Communications Commission v. NextWave Personal Communications, Inc.*, Nos. 01-653, 01-657, Reply Brief for the Federal Communications Commission at 12 (filed August 2002) ("a

and courts believe that where they transition customers of a bankrupt carrier to their service without any interruption, relocation, or change of service, they have established *new* service arrangements with the ILECs, and rejected the bankrupt carrier's executory service arrangements. The Commission certainly must see through this ruse. In such instances the purchaser is stepping into the shoes of the bankrupt carrier and reaping the benefits of the bankrupt carrier's contracts. The "transition" of customers from one carrier to another without any interruption, change or relocation of service in no way constitutes the establishment of new executory contracts, obviating the need for a cure. There simply is no justification for affording ILEC-creditors fewer rights to a cure than other creditors, particularly as ILECs had no choice but to enter into interconnection agreements and other service arrangements with the bankrupt carriers.

In addition, WorldCom is wrong that the Commission must act to ensure that ILECs do not obtain greater cure amounts than nondominant carriers from entities emerging from bankruptcy. This argument is disingenuous. ILECs and nondominant carriers alike are entitled to a cure of *all* debts. To the extent an ILEC and entity emerging from bankruptcy can agree to a *lesser* cure amount than permitted under bankruptcy law, such negotiations should be left to the full discretion of the parties involved.

The Commission, accordingly, should clarify that the Communications Act does not create an implicit "telecom" exception to the Bankruptcy Code, and ILECs have a right under Section 365 to obtain a cure from any carrier taking the benefits of a bankrupt carrier's service arrangement. Further, the Commission should declare that, to the extent a carrier seeks to benefit from a bankrupt carrier's pre-existing service arrangements with no interruption, relocation or

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debtor's obligations under executory contracts cannot be eliminated while debtor seeks to retain the benefits thereof").

other change in service, the successor carrier must comply with contract or tariff provisions requiring it to pay the outstanding indebtedness on those service arrangements.

V. CONCLUSION

For the foregoing reasons, the Commission should: (1) permit carriers expeditiously to revise their tariffs to provide adequate assurance of payment for services rendered to financially troubled companies; (2) support ILECs' efforts in Bankruptcy Courts to obtain advance payment for services rendered to bankrupt companies; and (3) confirm that carriers seeking to take the benefits of existing service arrangements of bankrupt carriers must pay a cure for outstanding debts on those arrangements — consistent with bankruptcy law and federal tariffs.

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<u>CERTIFICATE OF SERVICE</u>

I, Lacretia Hill, do hereby certify that on this 20th day of August, a copy of the foregoing "Reply" was served via U.S. Mail, First Class Postage Paid, to the parties listed on the attached sheets.

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